EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
APR 23 1999
CLERK

(4)

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari
to the Court of Appeals of the State of New York

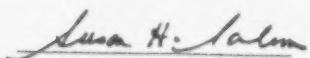
RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, Michael Shane Hale, asks leave to file the attached Brief in Opposition to Certiorari without prepayment of costs and to proceed *in forma pauperis*. In the trial and appellate courts of New York, respondent was allowed to proceed as a poor person and was represented by the Capital Defender Office of New York. Such counsel has agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of this motion is attached hereto.

50 pp

Date: New York, New York
April 21, 1999

Respectfully submitted,



SUSAN H. SALOMON
Counsel of Record

Capital Defender Office
915 Broadway
New York, New York 10010
(212) 780-5620

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
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Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

I, Michael Hale, being first duly sworn according to law, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to the redress I seek.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount (Past 12 months)**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	N/A	$ 0	N/A
Self-employment	$ 0	N/A	$ 0	N/A
Income from real property (such as rental income)	$ 0	N/A	$ 0	N/A
Interest and dividends	$ 0	N/A	$ 0	N/A
Gifts	$ 10	N/A	$ 10	N/A
Alimony	$ 0	N/A	$ 0	N/A
Child Support	$ 0	N/A	$ 0	N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 0	N/A	$ 0	N/A
Disability (such as social security, insurance payments)	$ 0	N/A	$ 0	N/A
Unemployment payments	$ 0	N/A	$ 0	N/A
Public-assistance (such as welfare)	$ 0	N/A	$ 0	N/A
Other (specify):_____	$ 0	N/A	$ 0	N/A
Total monthly income:	$ 10	N/A	$ 10	N/A

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	**Address**	**Dates of Employment**	**Gross monthly pay**
NONE			$

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	**Address**	**Dates of Employment**	**Gross monthly pay**
N/A			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	**Type of account**	**Amount-you**	**Amount- your spouse**

See attached certified statement of institutional account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. NONE

□ Home
Value $_____

□ Other real estate
Value $_____

□ Motor Vehicle #1
Year, make & model _____
Value $_____

□ Motor Vehicle #2
Year, make & model _____
Value $_____

□ Other assets
Description _____
Value $_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	**Amount owed-you**	**Amount owed-your spouse**
NONE	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	**Relationship**	**Age**
N/A	_____	_____

8. Estimate the average monthly expenses for you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? □ Yes □ No Is property insurance included? □ Yes □ No	$ 0	N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	N/A
Home maintenance (repairs and upkeep)	$ 0	N/A
Food	$ 0	N/A
Clothing	$ 0	N/A
Laundry and dry-cleaning	$ 0	N/A

Medical and dental expenses	$ 0	N/A
Transportation (not including motor vehicle payments)	$ 0	N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	N/A
Life	$ 0	N/A
Health	$ 0	N/A
Motor Vehicle	$ 0	N/A
Other: _____	$ 0	N/A
Taxes (not deducted from wages or included in mortgage payments) (Specify):_____	$ 0	N/A
Installment payments		
Motor Vehicle	$ 0	N/A
Credit card(s)	$ 0	N/A
Department store(s)	$ 0	N/A
Other: _____	$ 0	N/A
Alimony, maintenance, and support paid to others	$ 0	N/A
Regular expenses for operation of business, profession or farm (attach detailed statement)	$ 0	N/A
Other (specify): _____	$ 0	N/A
Total monthly expenses:	$ 0	N/A

9. Do you expect any changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

□ Yes ■ No If yes, describe on attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including completion of this form?

□ Yes ■ No If yes, how much? $_____

If yes, state the attorney's name address and telephone number:

_____

_____

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including completion of this form?

□ Yes ■ No If yes, how much? $_____

If yes, state the person's name address and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am currently incarcerated serving an indeterminate sentence of fifty years to life.

13. State the address of your legal residence.

New York Department of Corrections

Manhattan Detention Complex

125 White Street

New York, NY 10013

Your daytime phone number: N/A Your age: 26

Your years of schooling: 12 Your social-security number: 404-06-0401

I swear or affirm under penalty of perjury that the foregoing is true and correct.

Michael S. Hale
MICHAEL HALE

Duly witnessed and sworn to
before me, a Notary Public,
this 24 day of [illegible], 1999

[illegible]

SONYA A. ZOGHLIN
Notary Public, State of New York
No. 02ZO5061314
Qualified in Kings County
Commission Expires June 03

CORRECTION DEPARTMENT
CITY OF NEW YORK
MANHATTAN DETENTION COMPLEX

FAX MACHINE ROUTING INSTRUCTIONS

DELIVER TO: Susan Salomon
First Deputy Capital Defender
Capital Defender office

FROM: Jeanette Taylor
Business Manager
MDC

PLEASE CALL THE FOLLOWING TELEPHONE NUMBER IF THERE IS A PROBLEM IN TRANSMISSION

212 / 225 -- 1346

PRIORITY (CHECK APPROPRIATE BOX)

IMMEDIATE ☑ IMPORTANT ☑ ROUTINE ☐

THIS MATERIAL CONSISTS OF 9 PAGES INCLUDING THIS PAGE

REMARKS: Re: Michael Hale - Institutional Account as of 6/1/98 to 1/25/99. (Per your letter 1/20/99.)

01/25/99 19:01
MDC

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
06/01/98	WITHDRAWAL	CLIFF GRIGGS	1046876709	-115.00	48.58
06/01/98	TELEPHONE	SUMM. IN 1046862828	1046877815	-.49	48.09
06/01/98	TELEPHONE	SUMM. IN 1046862828	1046878315	-.37	47.72
06/01/98	TELEPHONE	SUMM. IN 1046862828	1046893621	-.49	47.23
06/03/98	TELEPHONE	SUMM. IN 1046931652	1046953685	-.37	46.86
06/05/98	COMMISSARY		1047028835	-17.33	29.53
06/05/98	TELEPHONE	SUMM. IN 1047012338	1047037059	-.55	28.98
06/05/98	TELEPHONE	SUMM. IN 1047012338	1047052842	-.47	28.51
06/06/98	TELEPHONE	SUMM. IN 1047059256	1047071274	-.37	28.14
06/07/98	MAIL DEPOSIT	753198MDC	1047097947	10.00	38.14
06/07/98	MAIL DEPOSIT	753199MDC	1047098365	10.00	48.14
06/07/98	TELEPHONE	SUMM. IN 1047096547	1047129574	-.49	47.65
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047146914	-.33	47.32
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047147015	-.33	46.99
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047147057	-.33	46.66
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047147100	-.33	46.33
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047147163	-.33	46.00
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047147990	-.49	45.51
06/08/98	TELEPHONE	SUMM. IN 1047132028	1047148110	-.33	45.18
06/09/98	PAYROLL	23.09S HKA/SPA	1047145345	19.60	64.78
06/09/98	PAYROLL	22.09S BACK PAY	1047165434	19.60	84.38
06/09/98	TELEPHONE	SUMM. IN 1047161529	1047182493	-.36	84.02
06/10/98	COMMISSARY		1047207021	-19.84	64.18
06/11/98	TELEPHONE	SUMM. IN 1047236712	1047251982	-.37	63.81
06/11/98	TELEPHONE	SUMM. IN 1047236712	1047255260	-.37	63.44
06/11/98	TELEPHONE	SUMM. IN 1047236712	1047269014	-.42	63.02
06/12/98	TELEPHONE	SUMM. IN 1047275101	1047285031	-.38	62.64
06/14/98	TELEPHONE	SUMM. IN 1047353889	1047388266	-.37	62.27
06/14/98	TELEPHONE	SUMM. IN 1047353889	1047388783	-.41	61.86
06/16/98	MAIL DEPOSIT	753275MDC	1047430627	100.00	161.86
06/16/98	TELEPHONE	SUMM. IN 1047430331	1047452609	-.33	161.53
06/16/98	TELEPHONE	SUMM. IN 1047430331	1047458214	-.42	161.11
06/17/98	COMMISSARY		1047476643	-23.67	137.44
06/17/98	TELEPHONE	SUMM. IN 1047464193	1047500640	-.37	137.07
06/17/98	TELEPHONE	SUMM. IN 1047464193	1047501188	-.41	136.66
06/23/98	PAYROLL	25.09S HKA & SPA	1047675893	19.60	156.26
06/23/98	PAYROLL	24.09S BACK PAY	1047679281	19.60	175.86
06/23/98	TELEPHONE	SUMM. IN 1047694726	1047722983	-.49	175.37
06/24/98	COMMISSARY		1047737661	-50.45	124.92
06/29/98	TELEPHONE	SUMM. IN 1047915713	1047947624	-.33	124.59
06/29/98	TELEPHONE	SUMM. IN 1047915713	1047948617	-.49	124.10

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 90?708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
06/30/98	PAYROLL	26.09S SPA & HKA	1047931475	19.60	143.70
06/30/98	TELEPHONE	SUMM. IN 1047951243	1047977496	-.37	143.33
06/30/98	TELEPHONE	SUMM. IN 1047951243	1047979305	-.41	142.92
07/01/98	MAIL DEPOSIT	753404MDC	1047991594	10.00	152.92
07/01/98	COMMISSARY		1047997846	-43.42	109.50
07/01/98	TELEPHONE	SUMM. IN 1047984737	1048004338	-.37	109.13
07/01/98	TELEPHONE	SUMM. IN 1047984737	1048009407	-.33	108.80
07/01/98	TELEPHONE	SUMM. IN 1047984737	1048017683	-.33	108.47
07/01/98	TELEPHONE	SUMM. IN 1047984737	1048017785	-.33	108.14
07/03/98	TELEPHONE	SUMM. IN 1048068969	1048104533	-.37	107.77
07/05/98	TELEPHONE	SUMM. IN 1048143498	1048153979	-.49	107.28
07/07/98	PAYROLL	27.09S SPA & HKA	1048212895	19.60	126.88
07/07/98	TELEPHONE	SUMM. IN 1048209053	1048242049	-.37	126.51
07/07/98	TELEPHONE	SUMM. IN 1048209053	1048242259	-.33	126.18
07/10/98	COMMISSARY		1048330874	-27.64	98.54
07/10/98	WITHDRAWAL	ANTONIO FERNANDEZ	1048345814	-20.00	78.54
07/14/98	PAYROLL	28.09S SPA & HKA	1048445890	19.60	98.14
07/15/98	COMMISSARY		1048509666	-33.82	64.32
07/15/98	TELEPHONE	SUMM. IN 1048500656	1048523276	-.37	63.95
07/18/98	TELEPHONE	SUMM. IN 1048615846	1048643260	-.49	63.46
07/22/98	WITHDRAWAL	COLT STUDIO	1048762876	-12.00	51.46
07/23/98	MAIL DEPOSIT		1048785586	20.00	71.46
07/24/98	COMMISSARY		1048817243	-26.82	44.64
07/26/98	TELEPHONE	SUMM. IN 1048889146	1048915936	-2.35	42.29
07/26/98	TELEPHONE	SUMM. IN 1048889146	1048922784	-.40	41.89
07/28/98	PAYROLL	30.09S HKA/SPA	1048940598	19.60	61.49
07/28/98	TELEPHONE	SUMM. IN 1048958272	1048981780	-.58	60.91
07/29/98	COMMISSARY		1048993979	-30.16	30.75
07/29/98	WITHDRAWAL	POSTAGE	1049005983	-4.00	26.75
07/29/98	TELEPHONE	SUMM. IN 1048993662	1049015744	-.49	26.26
07/29/98	TELEPHONE	SUMM. IN 1048993662	1049022143	-.41	25.85
07/30/98	TELEPHONE	SUMM. IN 1049030504	1049046796	-.45	25.40
07/30/98	TELEPHONE	SUMM. IN 1049030504	1049063914	-.49	24.91
07/30/98	TELEPHONE	SUMM. IN 1049030504	1049065826	-.38	24.53
07/31/98	TELEPHONE	SUMM. IN 1049068033	1049106904	-.49	24.04
07/31/98	TELEPHONE	SUMM. IN 1049068033	1049107623	-.37	23.67
08/01/98	TELEPHONE	SUMM. IN 1049111563	1049129603	-.49	23.18
08/01/98	TELEPHONE	SUMM. IN 1049111563	1049144682	-.33	22.85
08/01/98	TELEPHONE	SUMM. IN 1049111563	1049146263	-.33	22.52
08/02/98	TELEPHONE	SUMM. IN 1049150441	1049177128	-.36	22.16
08/02/98	TELEPHONE	SUMM. IN 1049150441	1049177760	-.46	21.70

01/25/99 19:01
MDC

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALB,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
08/03/98	TELEPHONE	SUMM. IN 1049185466	1049216686	-.49	21.21
08/04/98	PAYROLL	31.09S HKA/SPA	1049203203	19.60	40.81
08/04/98	TELEPHONE	SUMM. IN 1049221727	1049256571	-.49	40.32
08/05/98	MAIL DEPOSIT	753678MDC	1049268706	20.00	60.32
08/05/98	COMMISSARY		1049271017	-12.64	47.68
08/05/98	TELEPHONE	SUMM. IN 1049258348	1049279253	-.49	47.19
08/05/98	TELEPHONE	SUMM. IN 1049258348	1049280824	-.37	46.82
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049317456	-.33	46.49
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049324417	-.33	46.16
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049327379	-.38	45.78
08/06/98	TELEPHONE	SUMM. IN 1049300405	1049328076	-.37	45.41
08/07/98	TELEPHONE	SUMM. IN 1049340400	1049381821	-.33	45.08
08/08/98	TELEPHONE	SUMM. IN 1049390535	1049406090	-.49	44.59
08/08/98	TELEPHONE	SUMM. IN 1049390535	1049406405	-.37	44.22
08/08/98	TELEPHONE	SUMM. IN 1049390535	1049418751	-.34	43.88
08/10/98	TELEPHONE	SUMM. IN 1049464423	1049482387	-.49	43.39
08/10/98	TELEPHONE	SUMM. IN 1049464423	1049482621	-.37	43.02
08/11/98	PAYROLL	32.09S SPA/HKA	1049480522	19.60	62.62
08/11/98	PAYROLL	29.09S BACKPAY	1049490689	19.60	82.22
08/11/98	TELEPHONE	SUMM. IN 1049503578	1049528361	-.33	81.89
08/12/98	COMMISSARY		1049544697	-11.84	70.05
08/12/98	TELEPHONE	SUMM. IN 1049534200	1049568433	-.33	69.72
08/12/98	TELEPHONE	SUMM. IN 1049534200	1049569373	-.37	69.35
08/12/98	TELEPHONE	SUMM. IN 1049534200	1049570312	-.38	68.97
08/13/98	TELEPHONE	SUMM. IN 1049576293	1049602148	-.49	68.48
08/15/98	TELEPHONE	SUMM. IN 1049667264	1049688398	-.49	67.99
08/15/98	TELEPHONE	SUMM. IN 1049667264	1049688663	-.37	67.62
08/16/98	TELEPHONE	SUMM. IN 1049699292	1049728612	-.49	67.13
08/16/98	TELEPHONE	SUMM. IN 1049699292	1049728960	-.37	66.76
08/17/98	TELEPHONE	SUMM. IN 1049738417	1049772992	-.33	66.43
08/17/98	TELEPHONE	SUMM. IN 1049738417	1049773653	-.40	66.03
08/18/98	PAYROLL	0.33.09S SPA HKA	1049756738	19.60	85.63
08/18/98	TELEPHONE	SUMM. IN 1049776365	1049796685	-.49	85.14
08/18/98	TELEPHONE	SUMM. IN 1049776365	1049809543	-.33	84.81
08/19/98	COMMISSARY		1049822636	-9.24	75.57
08/19/98	TELEPHONE	SUMM. IN 1049813771	1049837818	-.49	75.08
08/20/98	TELEPHONE	SUMM. IN 1049854295	1049878424	-.34	74.74
08/20/98	TELEPHONE	SUMM. IN 1049854295	1049878501	-.33	74.41
08/21/98	TELEPHONE	SUMM. IN 1049896643	1049905901	-.43	73.98
08/21/98	TELEPHONE	SUMM. IN 1049896643	1049909276	-.43	73.55
08/23/98	TELEPHONE	SUMM. IN 1049979681	1050009973	-.49	73.06

The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
08/24/98	TELEPHONE	SUMM. IN 1050014895	1050033210	-.49	72.57
08/24/98	TELEPHONE	SUMM. IN 1050014895	1050050109	-.49	72.08
08/25/98	PAYROLL	34.09S HKA SPA	1050056646	19.60	91.68
08/25/98	TELEPHONE	SUMM. IN 1050055030	1050077934	-.49	91.19
08/26/98	COMMISSARY		1050098869	-20.17	71.02
08/26/98	COMMISSARY		1050098880	-2.00	69.02
08/28/98	TELEPHONE	SUMM. IN 1050175748	1050217397	-.36	68.66
08/31/98	TELEPHONE	SUMM. IN 1050294265	1050329152	-.49	68.17
09/01/98	PAYROLL	0.35 9 S SPA & HKA	1050312537	19.60	87.77
09/01/98	TELEPHONE	SUMM. IN 1050334491	1050364072	-.40	87.37
09/02/98	COMMISSARY		1050384961	-8.09	79.28
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050467779	-.33	78.95
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050480661	-.49	78.46
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050482824	-.37	78.09
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050496723	-.49	77.60
09/04/98	TELEPHONE	SUMM. IN 1050453182	1050497147	-.37	77.23
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050513345	-.49	76.74
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050537948	-.37	76.37
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050538025	-.33	76.04
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050538095	-.33	75.71
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050538297	-.33	75.38
09/05/98	TELEPHONE	SUMM. IN 1050503802	1050539659	-.47	74.91
09/07/98	TELEPHONE	SUMM. IN 1050580771	1050599019	-.37	74.54
09/08/98	TELEPHONE	SUMM. IN 1050611565	1050622307	-.47	74.07
09/08/98	TELEPHONE	SUMM. IN 1050611565	1050641582	-.49	73.58
09/08/98	TELEPHONE	SUMM. IN 1050611565	1050641917	-.37	73.21
09/09/98	PAYROLL	36.09S SPA/HKA	1050624886	19.60	92.81
09/09/98	COMMISSARY		1050655156	-19.70	73.11
09/09/98	TELEPHONE	SUMM. IN 1050647474	1050680295	-.49	72.62
09/09/98	TELEPHONE	SUMM. IN 1050647474	1050683208	-.38	72.24
09/10/98	MAIL DEPOSIT		1050715066	20.00	92.24
09/11/98	TELEPHONE	SUMM. IN 1050730601	1050772144	-.49	91.75
09/12/98	TELEPHONE	SUMM. IN 1050780325	1050803674	-.49	91.26
09/13/98	TELEPHONE	SUMM. IN 1050817318	1050827305	-.37	90.89
09/15/98	PAYROLL	37.09S HKA/SPA	1050880899	19.60	110.49
09/15/98	TELEPHONE	SUMM. IN 1050892512	1050906788	-.49	110.00
09/15/98	TELEPHONE	SUMM. IN 1050892512	1050909190	-.33	109.67
09/15/98	TELEPHONE	SUMM. IN 1050892512	1050909356	-.34	109.33
09/16/98	COMMISSARY		1050937303	-21.98	87.35
09/16/98	TELEPHONE	SUMM. IN 1050925681	1050954635	-.34	87.01
09/17/98	TELEPHONE	SUMM. IN 1050966624	1051007113	-.49	86.52

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The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
09/18/98	TELEPHONE	SUMM. IN 1051008845	1051046370	-.34	86.18
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051075860	-.45	85.73
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051087772	-.33	85.40
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051087875	-.33	85.07
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051087951	-.33	84.74
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051088362	-.38	84.36
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051088457	-.33	84.03
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051088720	-.33	83.70
09/19/98	TELEPHONE	SUMM. IN 1051052486	1051089368	-.40	83.30
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051095140	-.33	82.97
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051095188	-.33	82.64
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051120406	-.40	82.24
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051123663	-.37	81.87
09/20/98	TELEPHONE	SUMM. IN 1051093583	1051123922	-.34	81.53
09/21/98	TELEPHONE	SUMM. IN 1051128865	1051138528	-.38	81.15
09/21/98	TELEPHONE	SUMM. IN 1051128865	1051169628	-.47	80.68
09/22/98	PAYROLL	38.09S HKA/SPA	1051151021	19.60	100.28
09/22/98	TELEPHONE	SUMM. IN 1051169739	1051187804	-.49	99.79
09/22/98	TELEPHONE	SUMM. IN 1051169739	1051195379	-.36	99.43
09/22/98	TELEPHONE	SUMM. IN 1051169739	1051197744	-.49	98.94
09/24/98	TELEPHONE	SUMM. IN 1051246481	1051255167	-.37	98.57
09/24/98	WITHDRAWAL	ROJEANIA GODSEY-ERB	1051268278	-10.00	88.57
09/24/98	WITHDRAWAL	COLT STUDIO	1051269364	-26.25	62.32
09/25/98	COMMISSARY		1051292967	-12.48	49.84
09/26/98	TELEPHONE	SUMM. IN 1051333118	1051367349	-.49	49.35
09/26/98	TELEPHONE	SUMM. IN 1051333118	1051367737	-.37	48.98
09/29/98	PAYROLL	39.09S HKA/SPA	1051426422	19.60	68.58
09/30/98	TELEPHONE	SUMM. IN 1051487237	1051528093	-.33	68.25
09/30/98	TELEPHONE	SUMM. IN 1051487237	1051528836	-.33	67.92
10/02/98	MAIL DEPOSIT	755215MDC	1051579762	60.00	127.92
10/02/98	COMMISSARY		1051581769	-25.25	102.67
10/02/98	TELEPHONE	SUMM. IN 1051571143	1051614139	-.49	102.18
10/03/98	TELEPHONE	SUMM. IN 1051617323	1051629665	-.49	101.69
10/04/98	TELEPHONE	SUMM. IN 1051634308	1051664069	-.40	101.29
10/06/98	PAYROLL	40.09S HKA/SPA	1051704097	19.60	120.89
10/06/98	TELEPHONE	SUMM. IN 1051715482	1051751382	-.46	120.43
10/07/98	TELEPHONE	SUMM. IN 1051753209	1051780610	-.49	119.94
10/08/98	WITHDRAWAL	OUT/MAGZ.	1051809648	-12.95	106.99
10/09/98	COMMISSARY		1051827839	-9.66	97.33
10/09/98	COMMISSARY CORR.		1051827842	4.56	101.89
10/09/98	COMMISSARY		1051827846	-2.50	99.39

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MDC Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
10/14/98	PAYROLL	41.09S HKA/SPA	1052002047	19.60	118.99
10/15/98	COMMISSARY		1052073039	-21.82	97.17
10/15/98	COMMISSARY		1052073047	-1.47	95.70
10/16/98	MAIL DEPOSIT	755331MDC	1052116456	20.00	115.70
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052147952	-.33	115.37
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052148061	-.33	115.04
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052148269	-.33	114.71
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052148711	-.33	114.38
10/16/98	TELEPHONE	SUMM. IN 1052107226	1052149276	-.42	113.96
10/20/98	PAYROLL	42.09S HKA/SPA	1052210585	2.80	116.76
10/20/98	COMMISSARY		1052248948	-14.00	102.76
10/27/98	PAYROLL	43.11E HKA/SPA	1052488720	10.00	112.76
10/27/98	COMMISSARY		1052523654	-39.18	73.58
10/30/98	TELEPHONE	SUMM. IN 1052626404	1052654172	-.33	73.25
11/01/98	TELEPHONE	SUMM. IN 1052706683	1052715171	-.33	72.92
11/01/98	TELEPHONE	SUMM. IN 1052706683	1052721047	-.47	72.45
11/04/98	PAYROLL	44.11W	1052766830	10.00	82.45
11/04/98	TELEPHONE	SUMM. IN 1052810673	1052855914	-.42	82.03
11/06/98	COMMISSARY		1052904870	-37.10	44.93
11/08/98	TELEPHONE	SUMM. IN 1052991770	1053023324	-.37	44.56
11/09/98	COMMISSARY		1053035745	-15.32	29.24
11/09/98	COMMISSARY		1053035557	-.60	28.64
11/09/98	TELEPHONE	SUMM. IN 1053030127	1053047829	-.38	28.26
11/10/98	PAYROLL	45.11W HKA/SPA	1053048206	14.00	42.26
11/10/98	PAYROLL	45.11E HKA/SPA	1053048236	4.20	46.46
11/10/98	TELEPHONE	SUMM. IN 1053067410	1053085830	-.49	45.97
11/11/98	TELEPHONE	SUMM. IN 1053102700	1053117353	-.33	45.64
11/11/98	TELEPHONE	SUMM. IN 1053102700	1053117614	-.38	45.26
11/12/98	TELEPHONE	SUMM. IN 1053137453	1053156263	-.49	44.77
11/13/98	TELEPHONE	SUMM. IN 1053177670	1053216834	-.49	44.28
11/14/98	TELEPHONE	SUMM. IN 1053223807	1053225291	-.49	43.79
11/16/98	TELEPHONE	SUMM. IN 1053305764	1053315536	-.34	43.45
11/16/98	PAYROLL	46.11W HKA/SPA	1053318204	19.60	63.05
11/16/98	TELEPHONE	SUMM. IN 1053305764	1053329798	-.36	62.69
11/16/98	TELEPHONE	SUMM. IN 1053305764	1053335176	-.33	62.36
11/17/98	COMMISSARY		1053348935	-12.56	49.80
11/17/98	COMMISSARY		1053349315	-3.53	46.27
11/17/98	TELEPHONE	SUMM. IN 1053342113	1053372251	-.49	45.78
11/19/98	TELEPHONE	SUMM. IN 1053410739	1053430605	-.33	45.45
11/20/98	VISIT DEPOSIT		1053461429	90.00	135.45
11/20/98	TELEPHONE	SUMM. IN 1053450805	1053489798	-.49	134.96

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The City of New York
Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
11/22/98	TELEPHONE	SUMM. IN 1053530520	1053546496	-.49	134.47
11/23/98	COMMISSARY		1053578568	-26.48	107.99
11/23/98	COMMISSARY		1053581955	-3.24	104.75
11/23/98	TELEPHONE	SUMM. IN 1053570865	1053600228	-.42	104.33
11/24/98	PAYROLL	47.11W HKA/SPA	1053592824	19.60	123.93
11/25/98	WITHDRAWAL	OUT MAG. SUBCRIPTION	1053669174	-12.95	110.98
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053770676	-.49	110.49
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053805467	-.33	110.16
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053805665	-.33	109.83
11/28/98	TELEPHONE	SUMM. IN 1053769821	1053806256	-.33	109.50
11/29/98	TELEPHONE	SUMM. IN 1053807563	1053819602	-.33	109.17
11/29/98	TELEPHONE	SUMM. IN 1053807563	1053821328	-.49	108.68
12/01/98	COMMISSARY		1053888507	-26.71	81.97
12/01/98	PAYROLL	48.11W HKA/SPA	1053868597	19.60	101.57
12/01/98	TELEPHONE	SUMM. IN 1053888478	1053909075	-.33	101.24
12/01/98	TELEPHONE	SUMM. IN 1053888478	1053909280	-.37	100.87
12/01/98	TELEPHONE	SUMM. IN 1053888478	1053909976	-.49	100.38
12/03/98	TELEPHONE	SUMM. IN 1053965015	1053993170	-.80	99.58
12/08/98	PAYROLL	49.08 11W HKA/SPA	1054155072	19.60	119.18
12/08/98	COMMISSARY		1054178152	-16.32	102.86
12/10/98	TELEPHONE	SUMM. IN 1054246067	1054269549	-.96	101.90
12/11/98	WITHDRAWAL	SUMMIT UNIVERSITY P.	1054298384	-52.74	49.16
12/13/98	TELEPHONE	SUMM. IN 1054370689	1054396084	-.33	48.83
12/14/98	PAYROLL	50.11W HKA/SPA	1054428013	19.60	68.43
12/14/98	TELEPHONE	SUMM. IN 1054412775	1054447112	-.96	67.47
12/15/98	COMMISSARY		1054455963	-27.02	40.45
12/19/98	TELEPHONE	SUMM. IN 1054612003	1054612525	-.96	39.49
12/19/98	TELEPHONE	SUMM. IN 1054612003	1054640889	-.60	38.89
12/19/98	TELEPHONE	SUMM. IN 1054612003	1054649731	-.96	37.93
12/20/98	TELEPHONE	SUMM. IN 1054651003	1054662600	-.33	37.60
12/20/98	TELEPHONE	SUMM. IN 1054651003	1054663959	-.49	37.11
12/20/98	TELEPHONE	SUMM. IN 1054651003	1054664583	-.60	36.51
12/22/98	PAYROLL	51.11W HKA & SPA	1054719979	19.60	56.11
12/22/98	MAIL DEPOSIT	755814MDC	1054745770	125.00	181.11
12/24/98	COMMISSARY		1054831277	-21.48	159.63
12/25/98	TELEPHONE	SUMM. IN 1054862664	1054891997	-.96	158.67
12/25/98	TELEPHONE	SUMM. IN 1054862664	1054892280	-.60	158.07
12/29/98	PAYROLL	52.11 W HKA/SPA	1055006508	19.60	177.67
12/29/98	TELEPHONE	SUMM. IN 1055017438	1055045708	-.96	176.71
01/01/99	TELEPHONE	SUMM. IN 1055143424	1055175961	-.92	175.79
01/05/99	PAYROLL	01.11W SPA & HKA	1055274764	19.60	195.39

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MDC Department of Correction
Inmate's Transaction List

BAC Number :1419616586 HALE,MICHAEL
Property Bag(s) : 743756nic 743940vnic 743915vnic 909708bnic 909709bnic

Date	Description	Notes	Reference	Amount	Balance
01/06/99	WITHDRAWAL	COLT STUDIO	1055343988	-14.70	180.69
01/07/99	TELEPHONE	SUMM. IN 1055366209	1055381088	-.43	180.26
01/07/99	TELEPHONE	SUMM. IN 1055366209	1055397916	-.49	179.77
01/11/99	PAYROLL	02.11W HKA & SPA	1055545062	19.60	199.37
01/11/99	TELEPHONE	SUMM. IN 1055524498	1055561423	-.49	198.88
01/12/99	COMMISSARY		1055574813	-11.10	187.78
01/12/99	TELEPHONE	SUMM. IN 1055561521	1055587458	-.49	187.29
01/16/99	TELEPHONE	SUMM. IN 1055718440	1055740706	-.96	186.33
01/18/99	TELEPHONE	SUMM. IN 1055784842	1055815151	-.37	185.96
01/20/99	PAYROLL	HKA/SPA/HKA 03.11W	1055846650	19.60	205.56
01/22/99	TELEPHONE	SUMM. IN 1055945717	1055986473	-.45	205.11
01/24/99	TELEPHONE	SUMM. IN 1056028549	1056059532	-.50	204.61

Account Balance 204.09
Held Check Balance
Total Balance 204.09
Unpaid Restitution Balance

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

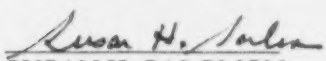
On Petition for a Writ of Certiorari
to the Court of Appeals of the State of New York

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The respondent, Angel Mateo, asks leave to file the attached Brief in Opposition to Certiorari without prepayment of costs and to proceed *in forma pauperis*. In the trial and appellate courts of New York, respondent was allowed to proceed as a poor person and was represented by the Capital Defender Office of New York. Such counsel has agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of this motion is attached hereto.

Date: New York, New York
April 21, 1999

Respectfully submitted,



SUSAN H. SALOMON
Counsel of Record

Capital Defender Office
915 Broadway
New York, New York 10010
(212) 780-5620

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
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CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

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Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

I, Angel Mateo, being first duly sworn according to law, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to the redress I seek.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount (Past 12 months)**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 7	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify):_____	$ 0	$ 0	$ 0	$ 0

Total monthly income: $ Ø $ Ø $ Ø $ Ø

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None - (incarcerated)			$
			$
			$

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes and other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None (incarcerated)			$
			$
			$

4. How much cash do you and your spouse have? $ ∠ $200

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount-you	Amount- your spouse
Bank	Saving	$ 150	$ none
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value $ none

☐ Other real estate
Value $ none

☐ Motor Vehicle #1
Year, make & model none
Value $_____

☐ Motor Vehicle #2
Year, make & model none
Value $_____

☐ Other assets
Description none
Value $_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	**Amount owed-you**	**Amount owed-your spouse**
none	$ 0	$ 0
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	**Relationship**	**Age**
none		

8. Estimate the average monthly expenses for you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly,

quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ incarcerated	$ incarcerated
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments) (Specify): _____	$ 0	$ 0
Installment payments		

Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: _____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including completion of this form?

☐ Yes ☑ No If yes, how much? $_____

If yes, state the attorney's name address and telephone number:

_____

_____

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a

paralegal or a typist) any money for services in connection with this case, including completion of this form?

☐ Yes ☑ No If yes, how much? $_____

If yes, state the person's name address and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the costs of this case. Incarcerated and on Death Row

13. State the address of your legal residence.

Clinton Correctional Facity

Route 374, Dannemora, New York 12929

Your daytime phone number: none Your age: 29

Your years of schooling: 10 Your social-security number: 088-56-1408

I swear or affirm under penalty of perjury that the foregoing is true and correct.

Angel Mateo

ANGEL MATEO

Duly witnessed and sworn to
before me, a Notary Public,
this 14 day of January 1999

WILLIAM T. EASTON
Notary Public, State of New York
County of Monroe
Commission Expires March 5, 2000

SCREEN DISPLAY OF I.C.A.S. TRANSACTIONS
SINCE THE BEGINNING OF THE MONTH
FOR DIN NUMBER -' 99B0067 MATEO ANGEL

FACILITY	TRANS DATE	TRANSACTION DESCRIPTION	TRAN NUMBER	TRANSACTION AMOUNT
CLINTON	01/21/99	ESTABLISH THIS ACCOUNT		.00
CLINTON	01/21/99	TRANSFER FUNDS	059770	.67
CLINTON	01/22/99	RECEIPT FROM VISITOR	78701	25.00
CLINTON	01/26/99	COMMISSARY PURCHASE	000000	22.08
CLINTON	01/29/99	MAIL RECEIPT	295632	25.00
CLINTON	01/29/99	POSTAGE		2.47

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DIN - 99B0067 FULL NAME - MATEO ANGEL ** **

SHORT NAME - AMAT NYSIIS - 5693205H LOCATION - SH-00-047

FROM FACILITY - DATE OF ADMISSION - 01/21/99

TO FACILITY - TYPE - DATE OUT -

BUYDAY - H COMM BUYLIST AMT - INMATE SPENDABLE - 26.12

WORK RELEASE STATUS - START - TERM -

EARLIEST RELSE DTE- LIFE

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CURRENT BALANCE -	26.12	BALANCE FORWARD -	26.12	LAG DAYS	
WORK RELEASE -	.00	PAYROLL -	.00	0	
COMM FOR PERIOD -	.00	COMM MTD -	.00		
DISBURSEMENTS -	.00	RECEIPTS -	.00	LAG AMOUNT	
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INMATES ACCOUNTS

TOTAL AMT ADV/ENC. - 0 . 00 TOTAL ADV/ENC. COLLECTED- 0 . 00

No. 98-1533

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Michael Shane Hale and Angel Mateo respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the New York Court of Appeals in this case. That opinion is reported at 92 N.Y.2d 613 (1998).

STATEMENT OF THE CASE

On December 22, 1998, a unanimous New York Court of Appeals invalidated the guilty plea provisions of the State's death penalty statute pursuant to United States v. Jackson, 390 U.S. 570 (1968). See Hynes v. Tomei, 92 N.Y.2d 613 (1998).[1] The Court of Appeals did not strike the death penalty, but merely excised the offending provisions. Jackson thus satisfied, New York joined all other death penalty jurisdictions.

In Jackson, this Court sustained a facial attack on the Federal Kidnaping Act. The Act put a defendant at risk of death *only* if he exercised the right to a jury trial and not if he pled guilty or requested a bench trial. This statutory scheme, the Court held, unduly and "needlessly" burdened the Sixth Amendment right to a jury trial and the Fifth Amendment privilege against self-incrimination. Jackson, as the Court's subsequent recapitulations of it confirm, endorses plea-bargaining in capital cases; Jackson simply reproves capital statutory schemes that provide for different maximum penalties depending upon whether a defendant pleads guilty or exercises the right to a jury trial. Since Jackson, all death penalty jurisdictions have easily accommodated this constitutional principle, eliminating categorical sentencing-range disparities, either by statutorily allowing for the risk of death whether a defendant pleads guilty or exercises the right to trial, or, as in Arkansas, by precluding guilty pleas unless the prosecution has first waived the

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[1] The decision of the New York Court of Appeals is reproduced in Appendix A to the Petition for a Writ of Certiorari (the "Petition" or "Pet."), pages 1a - 19a.

death penalty. See Appendix to Respondents' Brief in Opposition ("Resp. App.").

In 1995, however, New York enacted a capital pleading scheme unlike any other in the United States, in derogation of Jackson's principle. As the Court of Appeals explained in its decision (Pet. at 7a), New York's death penalty statute authorizes a District Attorney to file a notice of intent to seek the death penalty against a defendant charged with first-degree murder. See N.Y. Crim. Proc. Law § 250.40 (Consol. 1999).[2] Upon conviction of first-degree murder by a jury, a capital defendant -- *i.e.*, a defendant against whom the prosecution has filed a death notice -- faces a separate sentencing proceeding before a jury to determine whether the penalty will be death or life imprisonment without parole. See id. § 400.27. As enacted, the statute also afforded the capital defendant the opportunity to escape the risk of death and ensure a maximum sentence of life-without-parole by pleading guilty, upon consent of the court and prosecutor. See id. §§ 220.10(5)(e), 220.30(3)(b)(vii).[3] In fact, the statute, which has no provision for impaneling a sentencing jury after a guilty plea (Pet. at 17a), "bars imposition of a death sentence upon a guilty plea." Id. at 4a. The Court of Appeals therefore concluded that New York -- in violation of Jackson -- "explicitly provide[d] two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial." Id.

Unlike the Jackson Court, however, the Court of Appeals did not strike the death penalty

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[2] By its terms, § 250.40(1) requires the filing of a death notice as a precondition to the State's seeking the death penalty. Absent a filing or if the notice is filed but then withdrawn, the State may not seek the death penalty. Further, if withdrawn, the State may not re-file the notice. § 250.40(4). In the absence of a death notice, as the Court of Appeals noted (Pet. at 18a), the maximum available punishment for first-degree murder is life-without-parole, whether the defendant pleads guilty or exercises the right to trial. See N.Y. Penal Law §§ 60.06, 70.00(5) (Consol. 1999).

[3] These provisions are set out in full at pages 2 and 3 of the Petition.

provision. Discerning a legislative intent to restore capital punishment, the Court of Appeals decided that excising the capital pleading provisions would sustain that goal yet eliminate the burden on constitutional rights prohibited by Jackson, "since without these provisions there is only one maximum penalty for [death-noticed] first degree murder." Id. at 16a-17a. With this action, the Court of Appeals explained, "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending." Id. at 17a. Where, however, no such notice is pending, guilty pleas to first-degree murder are permitted, because defendants in that situation face the same maximum sentence -- life-without-parole -- regardless of how guilt is determined. See id. at 18a. The Court of Appeals also determined that guilty pleas to other lesser offenses, such as second-degree murder, are not prohibited in any circumstances, as Jackson did not bar "imposing different penalties for different crimes." Id.[4]

Petitioners now ask this Court to take the extraordinary step of overruling its precedent. Petitioners, however, present no reason to revisit, much less overrule, Jackson. Petitioners misstate its significance as constituting an "anti-plea bargaining holding." Id. at 16. In fact,

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[4] On January 27, 1999, Chief Judge Kaye, of the Court of Appeals, denied petitioners District Attorneys' applications for a stay of the judgment. The Attorney General of the State of New York, Intervenor in the state proceedings, had filed an affirmation taking "no position" on the stay applications. Affirmation of Attorney General dated January 25, 1999. On February 24, 1999, the Honorable Ruth Bader Ginsburg, Associate Justice of this Court and Circuit Justice for the Second Circuit, denied petitioners District Attorneys' application to stay the mandate of the New York Court of Appeals. The Attorney General of the State of New York did not participate in that stay application.

On March 29, 1999, Justice Albert Tomei, one of the two respondents in Hynes v. Tomei, informed this Court that "[i]t was only through a procedural peculiarity of New York law that [he] became a party to this matter in the first instance"; that he takes "no position on the petition"; and that he does not intend to participate in the case should certiorari be granted. The other respondent, Hale, as petitioners noted (Pet. at 9), pleaded guilty to second-degree murder following the Court of Appeals's decision.

Jackson endorses plea-bargaining. Its true holding -- that the risk of execution cannot be the statutory price of exercising Fifth and Sixth Amendment rights -- constitutes a vital but discrete doctrine in capital jurisprudence, whose narrow import has been well understood by all other capital jurisdictions and now by New York.

REASONS WHY THE PETITION SHOULD BE DENIED

After Hynes v. Tomei, 92 N.Y.2d 613 (1998), no government now "reserve[s] the maximum punishment . . . for those who insist on a jury trial." Corbitt v. New Jersey, 439 U.S. 212, 217 (1978). In the face of this now-nationwide conformity in death penalty schemes -- and with no indication that compliance with Jackson's narrow rule has impeded either the functioning of capital punishment or plea-bargaining in capital cases -- petitioners nevertheless insist that Jackson must be "formally overruled or expressly limited." Pet. at 11. Petitioners' arguments mischaracterize Jackson and otherwise manufacture "open questions," conflict and confusion where none exist. They present no occasion for the Court to depart from *stare decisis*. The Petition, therefore, should be denied.

A. Jackson Endorses Ordinary Plea-Bargaining, Including in Capital Cases.

Petitioners primarily argue that Jackson is "fundamentally irreconcilable" with the Court's subsequent decisions that have "established the propriety of discretionary plea negotiations with capital defendants . . . ." Pet. at 11. According to petitioners,

> the Court in *Jackson* indicated that it was constitutionally impermissible to offer a capital defendant a reduced sentence in exchange for his or her guilty plea, because the "inevitable" result would be to discourage that defendant from exercising the constitutional right to trial and to remain silent.

Pet. at 12. Petitioners' reading of Jackson is selectively incomplete and wrong. Jackson neither

held nor "indicate[d]" that capital plea-bargaining offends the Constitution. Rather, it proscribed legislative schemes that reserve the risk of death exclusively for those who exercise the right to a jury trial.

In Jackson, the Court lauded the Government's proffered justification that the statute sought to limit the death penalty to instances where juries recommend it. But that legitimate goal, the Court found, could be achieved without penalizing those defendants who demand a jury trial. For example, the Court observed, the choice between imprisonment and execution could always be left to the jury, "regardless of how defendant's guilt has been determined." 390 U.S. at 581-82. Because of "this and other alternatives," the Court held that the Act's death penalty provision "needlessly" penalized the assertion of a constitutional right, id. at 583, and struck it down.

The Court further explained that its facial invalidation of the statute did not jeopardize guilty pleas previously entered under it because "the fact that the . . . Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." Id. at 583.[5] The Court also made plain that the constitutional problem did not inhere in the ordinary practice of individualized plea-bargaining. Rather, the Court held that a legislative scheme that, without regard to the facts, *a priori* reserves the risk of execution for persons who plead not

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[5] The Court thus foresaw and took pains to forestall claims such as those later advanced by the defendant in Brady v. United States, 397 U.S. 742 (1970). In Brady, the Court dealt with the same statutory scheme as that contested in Jackson. Unlike Jackson, however, Brady had not challenged the statutory scheme pretrial but had entered a guilty plea, a plea that the Court refused to deem involuntary by an extension of Jackson. See id. at 746, 748. Stating that Jackson did not mandate a new test for the validity of guilty pleas, see id. at 747, Brady holds that guilty pleas entered to avoid the possibility of the death penalty are not thereby involuntary. Id. at 748, 754; accord Parker v. North Carolina, 397 U.S. 790, 794-95 (1970).

guilty exerts an "unnecessary and therefore excessive" chill upon the right to contest guilt, id. at 582, and that such persons "cannot [constitutionally] be put to death under its authority." Id. at 591.

Contrary to petitioners' characterization, Jackson thus did not disapprove ordinary capital plea-bargaining. Rather, Jackson treated *categorical legislative schemes* as altogether different in nature and consequences from ordinary *individualized* plea-bargaining, even in capital cases. In fact, the Court took care to *approve* statutory schemes under which capital guilty pleas could be accepted (such as those of Washington and California, see 390 U.S. at 582 & n.23), and held constitutional guilty pleas entered with the purpose and effect of avoiding a death sentence. See id. at 583.[6]

Thus, cases such as Chaffin v. Stynchcombe, 412 U.S. 17 (1973), and Bordenkircher v. Hayes, 434 U.S. 357 (1978), which endorse plea-bargaining, do not, as petitioners would have it, represent a "fundamental shift away from *Jackson*. . . ." Pet. at 13. These cases recognize the "give and take" of true plea-bargaining, which flows "from the mutuality of advantage to

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[6] Indeed, the Court, in its strongest terms, defended capital plea-bargaining in rejecting the Government's effort to save the Federal Kidnaping Act by reading it to forbid all guilty pleas. See id. at 584. In declining the Government's invitation absent an "unambiguous expression" of approval from Congress, id. at 585, the Court said of plea-bargaining: "But of course the inevitable consequence of this 'solution' would be to force all defendants to submit to trial, however clear their guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings. . . . Quite apart from the cruel impact of such requirement upon those defendants who would greatly prefer not to contest their guilt, it is clear -- as even the Government recognizes -- that the automatic rejection of all guilty pleas would rob the criminal process of much of its flexibility." Id. at 584 (internal quotation marks omitted). At page 95 of his brief to the New York Court of Appeals, the Kings County District Attorney quoted this very passage as support for his assertion that the negotiated guilty plea "has desirable practical and policy effects." For this reason as well, petitioners' assertions in this Court that Jackson was "anti-plea bargaining" (Pet. at 16) must be rejected.

defendants and prosecutors, each with his own reasons for wanting to avoid a trial." Bordenkircher, 434 U.S. at 363 (citations and internal quotations omitted). True plea-bargaining contemplates, as a necessary element, that a defendant will be faced with the difficult choice whether to risk a more severe punishment by pleading not guilty. See id. at 364. These cases further recognize that Jackson neither involved nor reproved true plea-bargaining; instead of "give and take," the statutory scheme at issue in Jackson invariably linked a higher penalty to exercise of the right to a jury trial, without regard to the facts of an individual defendant's case.[7] This, the Chaffin Court observed, was unconstitutional. 412 U.S. at 30 (Jackson's "sentencing structure" was struck down for chilling the exercise of basic constitutional rights). Indeed, the Court declared, "Jackson [is] clear and subsequent cases have not dulled [its] force: if the only objective of a state practice is to discourage the assertion of constitutional rights, it is 'patently unconstitutional.'" Id. at 33 n.20 (citation omitted); see also Bordenkircher, 434 U.S. at 363 (citing Jackson for principle that it is unconstitutional to "penalize a person's reliance on his legal rights").

Petitioners' misreading of Jackson is further confirmed by Corbitt v. New Jersey, 439 U.S. 212 -- which petitioners attempt but fail to turn to their benefit (Pet. at 14). There, the Court sustained a statutory scheme against a Jackson challenge because a defendant risked the *same* top sentence (albeit life imprisonment, not death) whether he pleaded guilty or went to trial. The

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[7] As one commentator has put it, the statute struck down by Jackson could not be sustained as reflecting ordinary plea-bargaining because "it could not be justified as a reflection of litigation uncertainties, since it applied to all defendants. . . . The state is [thus] forbidden to induce pleas by increasing . . . the sentence to be expected upon conviction [] to inappropriately high levels, . . . by a legislatively-designed penalty structure (as in Jackson)." Richard Adelstein, *The Negotiated Guilty Plea: A Framework For Analysis*, 53 N.Y.U. L. Rev. 783, 824, 827 (1978).

state did "not reserve the maximum punishment for murder for those who insist on a jury trial." Id. at 217. Since the prosecutor could offer a more beneficent plea, depending upon the vagaries of "'infinite variables peculiar to each individual [case],'" the Court, using the Jackson framework, concluded that, unlike in Jackson, it "'simply cannot be said that a state has [by statute] invidiously classified.'" Id. at 225-26 (quoting North Carolina v. Pearce, 395 U.S. 711, 722 (1969)). Petitioners' claim that Corbitt "was utterly irreconcilable with *Jackson*" (Pet. at 14) therefore collapses, given Corbitt's statutory scheme making the *same maximum* sentence available for the same crime, without regard to how defendant's guilt was adjudicated -- something petitioners fail even to mention.

This Court's other recapitulations of Jackson (also omitted by petitioners) reinforce its continuing vitality: It is the *sentencing scheme*, with its undue *legislative* burden on the accused's exercise of the constitutional rights to trial by jury and to plead not guilty, that is prohibited. Thus, in Ludwig v. Massachusetts, 427 U.S. 618, 627 n.4 (1976), the Court rebuffed the defendant's Jackson-based challenge to Massachusetts's two-tiered trial system because, in contrast to the statutory penalty structure in Jackson, "the same range of penalties [was] available at both tiers." And in Zant v. Stephens, 462 U.S. 862, 885 (1983), the Court again referred to Jackson as safeguarding the "request for trial by jury" -- a request that is "constitutionally protected."[8]

Ultimately, petitioners cannot demonstrate that this Court has cast doubt on Jackson's

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[8] See also Lockett v. Ohio, 438 U.S. 586, 634-36 (1978) (Rehnquist, J., concurring in part and dissenting in part) (rejecting a Jackson claim addressed to the Ohio death penalty statute -- a claim not addressed by the majority, which reversed on other grounds -- because, unlike the defendant in Jackson, who could have been executed only if he exercised his right to a jury trial, in "Ohio, a defendant is subject to possible execution whether or not he pleads guilty").

principle or that honoring Jackson's principle has impeded plea-bargaining in any death penalty jurisdictions in the country -- all of which have accommodated Jackson. Petitioners cannot do so because all of these other jurisdictions preserve the prosecutor's power to withhold or extend mercy to the capital defendant without legislatively differentiating the top sentence for the identical crime depending upon whether the defendant pleads guilty or exercises the right to trial. For in all these other jurisdictions, while the capital defendant may plead "open" (without a sentence guarantee) or go to trial and perhaps escape a death sentence, the prosecutor can still bargain with a capital defendant by offering a sentence less than death in exchange for a guilty plea. Put in Jackson's terms, legislative schemes that would reserve the maximum penalty for those who exercise the right to a jury trial are thus "needless" because they do not reflect individualized prosecutorial discretion and plea-bargaining and are not necessary to promote it. Plea-bargaining, then, simply does not raise issues that would require this Court to revisit or overrule Jackson.

B. Neither Jackson Nor the New York Court of Appeals's Application of It Raises Any Open Questions.

Petitioners next maintain that Jackson, specifically at 390 U.S. at 573, 578-81, "expressly left open" the question whether a "bifurcated capital statute, under which a capital defendant may exercise his or her right to a jury trial on the issue of guilt and still negotiate a plea if convicted, avoids the *Jackson* problem." Pet. at 16. Jackson, however, did no such thing.

Rather, at the pages cited by petitioners, the Jackson Court noted that the Government, in trying to "rescu[e] [the] statute from a charge of unconstitutionality," 390 U.S. at 580, had argued that a defendant could not avoid the risk of death by pleading guilty, claiming -- as an alternative to its argument that the statute could be read to prohibit all guilty pleas, see *ante* at 6

n.6 -- that the statute authorized the judge to convene a sentencing jury *after accepting a plea of guilty*. According to the Government, "Congress' failure to provide for the infliction of the death penalty upon those who plead guilty or waive jury trial was no more than an oversight that the courts can and should correct." Id. at 578. This Court rejected the Government's interpretation of the Federal Kidnaping Act and concluded that it was unnecessary to determine whether such a statutory scheme would be constitutional. See id. at 572-73, 579. The Court nonetheless cast constitutional doubt on the plea-sentencing scheme that the Government envisioned, noting that the trial judge would have to "take the extraordinary step" and "make[] an affirmative decision" to convene a penalty-phase jury after accepting a guilty plea; still, therefore, only a defendant who went to trial would "automatically" risk execution. Id. at 573 n.6.

The only other question even arguably left open was whether an "automatic" bifurcated *plea* and sentence system would be constitutional. This "open" question -- whose answer was strongly suggested by the Jackson Court's endorsement of such schemes then-extant in Washington and California, see 390 U.S. at 582 & n.23 -- has since been effectively answered in the affirmative by Corbitt v. New Jersey, 439 U.S. at 217 (no Jackson violation where same maximum punishment available regardless of how guilt is determined), and by the overwhelming majority of death penalty jurisdictions that have adopted such schemes. See, e.g., State v. Mann, 959 S.W.2d 503, 511 (Tenn. 1997) ("Unlike the statute at issue in Jackson, Tennessee law does not reserve the maximum punishment for murder for those who insist on a jury trial. Indeed, under Tennessee law, the State is free to seek the death penalty following entry of a guilty plea."), cert. denied, 118 S. Ct. 2376 (1998).[9] Indeed, petitioners acknowledge the

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[9] Under such statutory schemes, a defendant may also attempt to secure a discretionary (continued...)

constitutionality of such schemes. Pet. at 17-18 (providing "defendants the right to plead guilty and receive a death sentence, as well as a non-death sentence," is "solution" to Jackson "problem").

As for the "open" question that petitioners raise -- which they also recast as the "solution" New York had "adopted" for the Jackson "problem" (Pet. at 17-18) -- it is answered by Jackson itself, as the New York Court of Appeals (Pet. at 13a) observed:

> [The possibility of agreement on sentence following the guilt-phase] does not alleviate the *Jackson* problem, however, because bifurcation does not eliminate the statutory framework that allows the possibility of death only after a jury trial. Capital defendants under the New York statute who are awaiting trial and are offered a plea are still faced with the choice *Jackson* declared unconstitutional. . . .

Petitioners also hint that a bifurcated sentencing proceeding -- following a jury trial on guilt -- "[with] provision for consideration of mitigating and aggravating factors" is itself a "solution" to, or another "open question" surrounding, Jackson. Pet. at 17. Again, Jackson refutes the claim. To be sure, a capital defendant who proceeds to a jury trial may present mitigating evidence, which in some cases could reduce risk of a death verdict. But such a scheme nonetheless violates the Fifth and Sixth Amendments where only such a defendant faces the risk of a death sentence. See Jackson, 390 U.S. at 581 ("[T]he defendant who abandon[ed] the right to contest his guilt before a jury [was] assured that he [could not] be executed; the

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[9](...continued)
plea for a lesser sentence. They thus codify true plea-bargaining. Such schemes comport with Jackson because, absent a beneficial plea, the defendant equally risks a death sentence whether he pleads guilty or goes to trial. Contrary to petitioners' unelaborated description of it as a "'suicide' plea" (Pet. at 19), a capital defendant's guilty plea without the promise of a sentence other than death is no such thing. First, mandatory death sentences are unconstitutional. See, e.g., Sumner v. Shuman, 483 U.S. 66 (1987). And, in fact, such a guilty plea can constitute a powerful form of mitigation, evincing the accused's full acceptance of responsibility for his crime. Only a capital defendant's refusal to present any mitigation, or actual insistence on receiving the death penalty, can be characterized as an attempt at "judicial suicide."

defendant ingenuous enough to seek a jury acquittal [stood] forewarned that, if the jury [found] him guilty and [did] not wish to spare his life, he [would] die.").

In addition, petitioners maintain that Jackson's concerns are "satisfied" by a statutory requirement of prosecutorial consent for a guilty plea to first-degree murder and nondeath disposition -- a requirement that New York also had "adopted." Pet. at 17-18. Petitioners' legal pronouncement (or suggestion of another "open question") is unaccompanied by legal authority and flatly incorrect. Petitioners neglect to mention that the defendant in Jackson had no absolute right to plead guilty; in fact, under the Federal Kidnaping Act, a judge could have refused an improvident plea. 390 U.S. at 583. This Court explicitly noted that the power to reject guilty pleas "might alleviate, but [could not] totally eliminate, the constitutional infirmity in the capital punishment provision" at issue there. Id. Petitioners also fail to mention that the Court subsequently found North Carolina's capital pleading scheme, a scheme that had required the approval of both the trial judge and prosecutor for a defendant to plead guilty and avoid a death sentence, see Parker, 397 U.S. at 792 n.2, unconstitutional under Jackson. See Roseboro v. North Carolina, 403 U.S. 948 (1971).

What the Court has consistently recognized, of course, is that the constitutional infirmity of a Jackson-violative scheme is the same for any defendant: Whether the defendant is offered a guilty plea, whether the defendant's offer to plead guilty is rejected, or whether the defendant's lack of interest in a plea leaves the subject unbroached, the statutory scheme is impermissible because it allows a categorical disparity in maximum punishment for the very same offense depending on whether the defendant exercises or foregoes the right to a jury trial.

C. The New York Court of Appeals's Decision Has Created Nationwide Conformity In Honoring Jackson's Enduring Principle.

Finally, petitioners argue that the Court of Appeals's chosen remedy "cannot be what *Jackson* sought to promote," and that its decision manifests "serious confusion" and compounds "inconsistent results throughout the country." Pet. at 19-23. In fact, Jackson did not dictate any one particular remedy. And the one effected by the Court of Appeals was well within Jackson's contemplation.

Upon concluding that Congress could not impose the death penalty "in a manner that needlessly penalizes the assertion of a constitutional right," the Jackson Court struck the clause of the Federal Kidnaping Act that authorized the death penalty. 390 U.S. at 583-85, 591. The Court recognized, however, other possible remedies. Aside from allowing for the risk of death "regardless of how defendant's guilt has been determined," id. at 581-82, another constitutional cure, as the Government had suggested, was requiring that all capital cases proceed to a jury trial, for that, too, would eliminate the sentence disparity. See id. at 584. As noted *ante* at 6 n.6, the Jackson Court rejected that option because of the lack of express congressional intent and consequent reluctance to engage in "judicial reconstruction."

Here, in severing the capital guilty plea provisions but retaining the death penalty, the Court of Appeals also sought to accommodate legislative intent and eschew judicial rewriting. Even though almost all death penalty jurisdictions have obviated or remedied the Jackson problem by providing for the possibility of a death sentence upon a guilty plea, the Court of Appeals recognized that currently no statutory mechanism exists in New York for a jury to sentence a defendant following a guilty plea (Pet. at 17a) and declined to create one, just as the Jackson Court had declined to read such a provision into the Federal Kidnaping Act. 390 U.S. at

580.[10]

New York's resultant statutory scheme now precludes a defendant's pleading guilty to first-degree murder once the prosecution has filed -- and refuses to withdraw -- notice of intent to seek the death penalty, N.Y. Crim. Proc. Law § 250.40(1) (Consol. 1999). With this solution -- whose propriety the Jackson Court recognized -- the Court of Appeals has insured that the maximum punishment, death, is not reserved only for those who insist on a jury trial as opposed to those who plead guilty to the very same crime, *i.e.*, death-noticed murder. If, however, the prosecution has withheld or withdrawn death notice, plea-bargaining with respect to first-degree murder remains unaffected, because life-without-parole stands as the same top sentence for the crime of "non-death-noticed" murder, regardless of how guilt is determined. Plea-bargaining to lesser offenses not punishable by death remains unaffected, since the maximum penalty structure for them will not hinge on how guilt is determined.[11]

The Court of Appeals's ruling not only conforms to Jackson, but accords with Jackson's progeny. In fact, petitioners cannot point to a single capital jurisdiction that fails to comply with

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[10] The New York Legislature is free, of course, to create a statutory mechanism for jury sentencing, including the possibility of a death sentence, following a guilty plea to capital murder.

[11] Petitioners' examples of potential plea-bargains and sentences for first- and second-degree murder are confusing and do not, in any case, advance the constitutional inquiry. Pet. at 19. A nondeath disposition for a single count of first-degree murder ranges from 20 to life to life-without-parole. See N.Y. Penal Law §§ 60.06, 70.00(3)(a), (5) (Consol. 1999). An authorized disposition for a single count of second-degree murder ranges from 15 years to life imprisonment to 25 years to life imprisonment. See id. § 70.00(3)(a). Whether multiple counts of either crime may be sentenced consecutively is a separate matter of state law. See id. § 70.25(2). The constitutional point, however, is that where the prosecution is seeking the death penalty, and thus has filed death notice pursuant to N.Y. Crim. Proc. Law § 250.40(1) & (2) (Consol. 1999), the authorized maximum penalty for first-degree murder is death, which, before the Court of Appeals's decision, was statutorily available only upon conviction after trial and precluded upon conviction by a guilty plea.

Jackson. There are none. See Resp. App. Rather than acknowledge this, petitioners cite State v. Mann, 959 S.W.2d 503, but fail to note that the Tennessee Supreme Court rebuffed a Jackson challenge there because the challenged statute allowed the prosecution to seek the death penalty after a guilty plea. Id. At 511. Petitioners' incomplete discussion of Conger v. Warden, 510 P.2d 1359 (Nev. 1973), similarly misleads, for Nevada likewise permits "open" pleas in capital cases, with a judicial panel deciding on sentence. See Nev. Rev. Stat. §175.552(1)(b) (1997). Consequently, as Conger put it, "[t]here [is] no disparity in the power to punish." 510 P.2d at 1361. And, petitioners refer to Louisiana law but ignore the Louisiana capital defendant's unqualified right to plead guilty and face a capital sentencing jury. See La. Code Crim. Proc. Ann. art. 557(A), 905.3 (West 1997).[12]

Finally, as for Arkansas, while its death penalty statute forbids a guilty plea with death as a possible sentence, it requires that the prosecutor "waive[] the death penalty" as a predicate for a guilty plea; otherwise, the capital defendant "may [not] waive trial by jury." Ark. Code Ann. §§ 5-4-608(a-b), 16-89-108(a-c) (Michie 1997); Ark. Code Ann., R. Crim. Proc. 31.4 (Michie 1993). Arkansas's high court echoed the unqualified requirement of the prosecutor's waiver in sustaining the statute against a Jackson challenge: "the prosecutor must waive the death penalty with the permission of the court before the defendant may waive either trial by jury on the issue of guilt or his right to have sentence determined by a jury." Ruiz v. State, 630 S.W.2d 44, 47 (Ark.), cert. denied, 459 U.S. 882 (1982). This statutory scheme thus eliminates any maximum-

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[12] Petitioners cite State v. Jett, 419 So.2d 844 (La. 1982), as upholding the constitutionality of a capital pleading scheme similar to New York's. Pet. at 20. Contrary to petitioners' suggestion, Jett did not involve a Jackson challenge to the statutory scheme; Jackson is not even mentioned in the decision. In any case, Louisiana's current scheme, different from the one at issue in Jett, complies with Jackson.

sentence disparity by requiring that all death-noticed cases proceed to trial. It assures that, if the prosecutor revokes the death notice, the defendant is no longer subject to the death penalty whether he pleads guilty or goes to trial; instead, he is subject to the same top sentence of life imprisonment.

Petitioners call such a scheme "strained and sophistic." Pet. at 22. Jackson deems it neither. See Jackson, 390 U.S. at 584-85 (requiring all death-noticed defendants to have a jury trial and thus eliminating guilty pleas is, while perhaps "cruel," a constitutional, legislative option). In the next breath, petitioners contend that New York's stricken plea provisions "precisely" matched Arkansas's scheme because all the Arkansas "provision does is provide for a system by which, in a capital case, the prosecution would, instead of seeking the death penalty, consent to a non-death disposition in return for the defendant's guilty plea." Pet. at 22. The comparison, however, mischaracterizes New York's former scheme. Of course, if the State does not seek the death penalty -- *i.e.*, never files death notice or withdraws it pursuant to N.Y. Crim. Proc. Law § 250.40 (Consol. 1999) -- the top sentence for first-degree murder is life-without-parole, whether the defendant pleads guilty or not. But where the State has filed a death notice, and so is "seeking the death penalty," New York's provisions were, as the Court of Appeals correctly recognized, unconstitutional precisely because the defendant risked execution only upon a jury verdict convicting him of first-degree murder but not upon a guilty plea to the identical crime.

In short, Hynes v. Tomei reflects no confusion, and there is no inconsistency around the country.

D. There Are No Remaining Reasons To Reexamine Jackson.

Petitioners' overarching argument that Jackson is ripe for overruling lacks foundation. This Court brings the utmost caution to reconsideration of its decisions. *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). Thus, *stare decisis* yields only where a prior decision's underpinnings have been eroded by subsequent decisions of the Court, see United States v. Gaudin, 515 U.S. 506, 520 (1995), or where the prior decision has splintered the Court and has "baffled and divided the lower courts that have considered it," Nichols v. United States, 511 U.S. 738, 743-46 (1994); see also Payne, 501 U.S. at 829-30 (observing that lower courts had differed in interpreting the opinions and footnotes in the overruled decisions); cf. Mitchell v. United States, __ U.S. __ (1999), No. 97-7541, 1999 WL 181164, at *14 (U.S. April 5, 1999) (Scalia, J., dissenting) (*stare decisis* does not yield merely to correct a "wrong turn").

These jurisprudential concerns are absent here. Since Jackson, the Court has neither held nor hinted that it is constitutionally acceptable for a crime to have a higher, legislated maximum punishment where the accused exercises his right to a jury trial. Since Jackson, lower courts have understood the decision's import. That understanding continues unabated. See, e.g., United States v. Lott, 156 F.3d 1240 (9th Cir. 1998) (unpublished table decision) *available in* No. 97-30339, 1998 WL 482975, at *1 (Aug. 12, 1998) ("Unlike the statute at issue in United States v. Jackson, . . . 21 U.S.C. § 841(b)(1)(A) does not *by its terms* penalize a defendant's choice to exercise the Sixth Amendment right to a jury trial. The enhancement applies regardless whether the defendant pleads guilty or is found guilty of a crime by a jury, so long as the

defendant has a proven prior conviction.") (emphasis added); Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998) (observing that Jackson does not preclude guilty pleas entered to avoid the possibility of the death penalty).

CONCLUSION

For the foregoing reasons, respondents Hale and Mateo respectfully submit that the Petition for a Writ of Certiorari to the New York Court of Appeals should be denied.

Respectfully submitted,

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Appendix

Federal Procedure: 18 U.S.C. § 3593 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's motion and with approval of the government, before the court).

Alabama: Ala. Code § 13A-5-42, 43, 45 (1998) (a defendant may plead guilty to a capital crime; the state still must prove the defendant's guilt to a jury; upon conviction, the defendant may be sentenced to death if so determined in a hearing held before a jury or the court).

Arizona: Ariz. Rev. Stat. § 13-703(B) (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Arkansas: Ark. Code Ann. §§ 5-4-608, 16-89-108 (Michie 1997); Ark. Code Ann., R. Crim. Proc. 31.4 (Michie 1993) (no defendant charged with a capital crime may waive either trial by jury on the issue of guilt or sentence if the prosecution seeks a sentence of death; in those cases where the court permits the prosecution to waive the death penalty, the defendant may thereafter plead guilty, or proceed with a jury trial or bench trial with a possible penalty of life without parole).

California: Cal. Penal Code § 190.4 (West 1998) (upon a plea of guilty to a capital crime, a jury, or the court if both sides agree to waive a jury, determines whether a special circumstance exists warranting a penalty of death; if the trier of fact finds a special circumstance, a hearing shall be held to determine whether the penalty of death should be imposed).

Colorado: Colo. Rev. Stat. § 16-11-103 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death in a separate sentencing hearing held before a three-judge panel).

Connecticut: Conn. Gen. Stat. § 53a-46a (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's motion and with approval of the court and consent of the state, before the court).

Delaware: Del. Code Ann. tit. 11, § 4209 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's and the state's waiver, before the

court).

Florida: Fla. Stat. Ann. § 921.141 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, on the defendant's waiver, before the court).

Georgia: Ga. Code Ann. § 17-10-32 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death by the court if the court finds the existence of at least one statutory aggravating circumstance, except in cases of treason and aircraft hijacking, in which no aggravating circumstance is required).

Idaho: Idaho Code § 19-2515 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Illinois: 720 Ill. Comp. Stat. Ann. 5/9-1 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if the state requests a determination as to whether death is an appropriate penalty, and it is so determined in a hearing held before a jury or, upon the defendant's waiver, before the court).

Indiana: Ind. Code Ann. § 35-50-2-9 (West 1988) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Kansas: Kan. Stat. Ann. § 21-4624 (1997) (upon conviction of a capital offense, including a judgment of guilt entered upon a plea of guilty, Kan. Stat. Ann. § 21-3110(4) (1997), the court, upon motion of the county or district attorney, shall conduct a sentencing proceeding to determine whether the defendant shall be sentenced to death).

Kentucky: Ky. Rev. Stat. Ann. § 532.025 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's and the state's waiver, before the court). *See* Commonwealth v. Johnson, 910 S.W.2d 229 (Ky. 1995).

Louisiana: La. Code Stat. Crim. Proc. Ann. art. 557, 905 (West 1997) (a defendant may plead guilty in a capital case, with the consent of the court and state, provided that, if the state pursues a sentence of death, the court shall impanel a jury for the purpose of conducting a hearing to determine the issue of penalty).

Maryland: Md. Ann. Code art. 27, § 413 (1998) (a defendant who pleads guilty to a

capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's waiver, before the court).

Mississippi: Miss. Code Ann. § 99-19-101 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the written agreement of the defendant and the state, before the court).

Missouri: Mo. Ann. Stat. §§ 565.006, 565.030 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court or, if agreed to by the state, before a jury).

Montana: Mont. Code Ann. § 46-18-301 (1997) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Nebraska: Neb. Rev. Stat. § 29-2520 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court that accepted the plea or a three-judge panel).

Nevada: Nev. Rev. Stat. § 175.552 (1997) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a three-judge panel).

New Hampshire: N.H. Rev. Stat. Ann. § 630:5 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

New Jersey: N.J. Stat. Ann. § 2C:11-3 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's motion and consent of the prosecuting attorney, before the court).

New Mexico: N.M. Stat. Ann. §§ 31-18-14; 31-20A-1(B) (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court or, upon demand of either party, before a jury).

North Carolina: N.C. Gen. Stat. § 15A-2000 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Ohio: Ohio Rev. Code Ann. § 2929.02 (West 1998); Ohio R. Crim. Proc. 11 (West 1999) (a defendant charged with a capital offense may plead guilty, addressing separately each charge and capital specification; if the pleas are

accepted, a three-judge court shall conduct a hearing to determine whether the defendant committed a capital offense; if so, the panel shall conduct a hearing to determine whether the defendant should be sentenced to death).

Oklahoma: Okla. Stat. Ann. tit. 21, § 701.10 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Oregon: Or. Rev. Stat. § 163.150 (1997) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9711(b) (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's waiver and consent of the Commonwealth, before the court).

South Carolina: S.C. Code Ann. § 16-3-20 (Law. Co-op. 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

South Dakota: S.D. Codified Laws §§ 23A-27A-2, 23A-27A-6 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Tennessee: Tenn. R. Crim. Proc. 11(4) (1998); Tenn. Code Ann. § 39-13-205(b), (c) (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury or, upon the defendant's waiver, before the court).

Texas: Tex. Crim. P. Code Ann. arts. 1.13, 26.14 (West 1997); Tex. Penal Code Ann. § 12.31 (West 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Utah: Utah Code Ann. § 76-3-207 (1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury, or upon the defendant's request and with approval of the court and consent of the prosecution, before the court).

Virginia: Va. Code Ann. §§ 19.2-257, 19.2-264.4 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).

Washington: Wash. Rev. Code Ann. § 10.95.050 (West 1998) (a defendant who pleads

guilty to a capital crime may be sentenced to death if so determined in a hearing held before a jury).

Wyoming: Wyo. Stat. Ann. § 6-2-102 (Michie 1998) (a defendant who pleads guilty to a capital crime may be sentenced to death if so determined in a hearing held before the court).